IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.2616 OF 2004
WITH
WRIT PETITION NO.2641 OF 2004

W.P. NO.2616/2004:

Mr.Ashraf Biran. ...Petitioner.
Vs.
Municipal Corporation for Gr. Mumbai, & Ors. ...Respondents.
....
Mr. Shyam Diwan with Mr. A. Diamondwala i/b. Divya Shah Associates for the Petitioner.
Mr.N. V. Walawalkar with Ms. A. Savla for Respondent No.1.
Mr. R.A. Dada with Mr.Nankani and Mr.Khokawala i/b. Nankani & Asso. For Respondent No.4.
.....

W.P. NO.2641/2004:

Suparibaug Madhyavarti Sahakari Grahak Sangh Limited. ...Petitioner.
Vs.
Municipal Corporation for Gr. Mumbai, & Ors. ...Respondents.
....
Mr. S.K. Amey with Mr.Raymond i/b. M/s.Raymond & Co. for the Petitioner.
Mr.N. V. Walawalkar with Ms. A. Savla for Respondent No.1.
....

CORAM : DALVEER BHANDARI, C.J. &
DR.D.Y.CHANDRACHUD, J.

October 14, 2004.

P.C.:

The award of a contract, following the conclusion of a tender enquiry for conducting a Medical Shop at KEM Hospital, Mumbai, forms the subject matter of these proceedings. The Municipal Corporation invited tenders on 21st May 2004 from persons with a minimum of three years' experience in running a Medical Shop and having an annual turn over at least of Rs.1 crore over the previous three financial years. The two Petitioners in these proceedings were amongst the ten bidders who submitted bids in pursuance of the tender. Technical bids were opened on 3rd June 2004. On 16th August 2004, the commercial bids of three bidders who were found to be technically qualified were opened. Among them, the bid of the Petitioner in Writ Petition 2616 of 2004 was opened. The bid submitted by the Petitioner in Writ Petition 2641 of 2004 was rejected as not being responsive. The contract has been awarded to the Fourth Respondent in Writ Petition 2616 of 2004, whose bid of Rs.15,16,178/- per month, is the highest bid. The Petitioner in the aforesaid petition submitted a bid of Rs.11,11,779/-. The acceptance of the bid was communicated to the successful bidder by the Dean of G.S. Medical College and KEM Hospital on 30th August 2004 and the Fourth Respondent was called upon to deposit an amount of Rs. 47.43 lakhs in

accordance with the tender conditions. That amount was deposited and the premises have been handed over to the successful bidder for conducting a Medical Shop.

2. The challenge to the award of the contract to the successful bidder is sought to be questioned on the ground that there was a violation of clause 4 of the tender conditions which provided as follows :

> "4. All Tenderers must disclose the names of their partners, if any, in the particular contract in the space provided in the FORM OF UNDERTAKING TO BE SIGNED BY THE TENDERER. Any Tenderer failing to do so shall render himself liable to have his Earnest Money Deposit and Security Deposit forfeited and the contract, if entered into, shall be cancelled at any time during its currency. Further it shall invite penal action including black listing.
>
> A) Firms with common proprietor/Partner or connected with one another either financially or as principal and agent or as master and servant or with Proprietor/Partner closely related to each other such as husband, wife, father/mother and son/daughter and brother shall not tender separately under different names for the same contract.
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> B) If it is found that firms as described in clause 4 (A) above have tendered separately under different names for the same contract, all such Tender/s stand rejected and Earnest Money Deposit of each such Tenderer shall be forfeited. In addition such Tenderer

shall be liable, at the discretion of the Municipal Commissioner, for further Penal Action including blacklisting etc.

C) If it is found that closely related persons as Clause 4(A) have submitted separate Tender under different names firms/establishment but with common address for such Firm/Establishment and/or in such Firm/Establishment though they have different address, are managed or governed by the same person/s jointly or severally, such Tender shall be liable for action as in clause no.1(B) including similar action against the Firm/Establishment concerned.

D) If after award of the Contract, it is found that the responsive Tenderer violates any of the Clauses 4(A) to 4(C) above, the contract shall be liable for cancellation at any time during its currency and Earnest Money Deposit and Security Deposit paid by the responsive Tenderer shall be forfeited and in addition to that penal action including blacklisting against the contractors as well as related firm/establishment."

3. The contention of the Petitioner is that the Fourth Respondent entered into a Joint Venture Agreement on 24th April 2004 with Sahakari Bhandar Co-operative Stores, Colaba (Medical Stores Division) ("Sahakari Bhandar"). The allegation is that the aforesaid contract disentitled the Fourth Respondent as well as Sahakari Bhandar to submit bids since the effect thereof was that these two bidders were connected with each other financially, within the meaning of clause 4(A) of the Instructions to Tenderers.

Their bids, it is urged, were liable to be rejected.

4. On behalf of the Fourth Respondent, an affidavit in reply has been filed by one of its partners on 24th September 2004 clarifying that an agreement was initially entered into between a Company by the name of 'Pinnacle Biomed Private Limited', which was promoted by the aforesaid partner and another with Sahakari Bhandar on 22nd April 2004. However, on 22nd May 2004 and 23rd May 2004, the Staff Union of Sahakari Bhandar physically resisted and threatened the staff of the aforesaid Company. Hence, the agreement was terminated. A letter of termination was issued on 23rd May 2004 and was acknowledged by Sahakari Bhandar on 24th May 2004. Hence, it has been submitted that no business relationship exists or existed between the Fourth Respondent and Sahakari Bhandar which would have debarred either of them from participating in the tender process.

5. On behalf of the Petitioner, the validity of the termination of the Memorandum of Understanding between the Fourth Respondent and Sahakari Bhandar is sought to be questioned. We cannot accede to this submission for the simple reason that the

validity of the termination of the Memorandum of Understanding cannot be adjudicated upon in these proceedings under Article 226 of the Constitution, that too, at the behest of the Petitioner who is not a party to the contract. For the purpose of these proceedings, the termination of the contract must be regarded as having taken place upon the letter dated 23rd May 2004. Nothing has been placed on the record to doubt the genuineness or authenticity of the letter of termination. The contract has been awarded to the Fourth Respondent who is the highest bidder. No dispute has been raised, save and except for the submission noted earlier, in regard to the eligibility or qualification of the Fourth Respondent

6. In so far as the companion Petition is concerned, the bid submitted by the Petitioner was rejected as non-responsive on the ground that under the tender requirements contained in Clause 7 (xiii) copies of PAN documents and photographs of the individuals, owners, or as the case may be, of partners in the case of the Partnership Firms and the Directors in the case of an incorporated Company were to be furnished and that the aforesaid condition had not been complied with due to the non submission of photographs.

Counsel appearing for the Petitioner in the companion petition fairly stated that the outcome of the aforesaid petition would depend upon the view which this Court would take in Writ Petition No.2616 of 2004. For the reasons already noted, we have held that there is no merit in Writ Petition No.2616 of 2004. However, in so far as the companion petition is concerned, we had, in order to assess the bonafides of the Petitioner, enquired of Counsel before arguments commenced as to whether the Petitioner would be willing to match the bid or submit a higher bid than that submitted by the successful bidder. Counsel stated on instructions that it was not possible for the Petitioner to do so. That apart, the Petitioner has to blame himself for having failed to comply with the tender conditions. Even if the tender condition in regard to the submission of photographs with the tender is not regarded as an essential condition of the tender, we are of the view that the invocation of the jurisdiction of this Court, under Article 226 of the Constitution, is manifestly not warranted in the facts of this case. The contract has been awarded to the highest bidder, a bid which the Petitioner has not been able to match or exceed. As a bidder submitting a bid in a tender enquiry, the Petitioner could only have been conscious of the fact that its bid was liable to be rejected if

the requirements of the tender were not fulfilled.

7. In the circumstances, we do not find any merit in either of the two petitions. The petitions shall stand rejected. There shall be no order as to costs.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD, J.